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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 788

AL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1966. The petition for a writ of certiorari was filed on November 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a contempt proceeding for refusal to answer questions after a grant of immunity, the government must prove—and the witness may challenge—the pertinency of the questions to the inquiry by the grand jury.

STATEMENT

In *Harris* v. *United States*, 382 U.S. 162, this Court held that petitioner could not be summarily punished under Rule 42(a) for refusal to answer questions before a grand jury. The instant case involves his subsequent punishment for contempt under Rule 42(b).

On July 31, 1963, petitioner appeared before a federal grand jury in the Southern District of New York and was asked several questions concerning his participation in a dice game in Florida, which he refused to answer on the ground of self-incrimination (R. 73–75). A hearing was then held before a judge of the Southern District who, after being advised by government counsel that petitioner would be granted immunity pursuant to 47 U.S.C. 409(l), stayed further proceedings until petitioner was accorded assistance of counsel (R. 72). On the following day government counsel again advised the court that the grand jury was investigating possible violations of the Federal Communications Act (47 U.S.C. 203(c) and 501) and of 18 U.S.C. 1952, and that petitioner would receive immunity with respect to the investigation pursuant to 47 U.S.C. 409(l) (R. 81–83). After determining that the grand jury was in fact investigating possible violations of the Federal Communications Act, and that 47 U.S.C. 409(l) afforded complete immunity to petitioner, the court directed that a new subpoena be served specifying an investigation of communication violations, and that in any questioning before the grand jury petitioner be asked only questions relating to the use of a telephone (R. 92–93).

Under command of the new subpoena, petitioner reappeared before the grand jury. After again being told of the grant of immunity, he refused to answer the following questions (R. 42–46):

1. Do you know of a phone call made by John Manarite around January or early February of this year 1963 from Miami, Florida, to Flushing, New York, in connection with the leasing of the premises in Ojus, Florida, for the purposes of a dice game?
2. Do you know whether or not Mr. Manarite used a pay telephone?
3. Do you know whether or not he used private premises to make that telephone call?
4. Do you know, Mr. Harris, whether anybody else's premises were used by Mr. Manarite for that telephone call?
5. Do you know who Mr. Manarite was working for or in partnership with in connection with the leasing of these premises that he talked about, in his telephone conversation with the person or persons he talked to on the telephone from Florida to Flushing, New York?
6. Do you know whether or not Mr. Manarite was, at the time of the making of this phone call, in the employ or in partnership with one Carmine Tramunti?
7. Do you know whether or not at the time of the making of this phone call Mr. Manarite was in the employ of or in partners with Mr. Thomas Luchese?
8. Mr. Harris, I ask you, do you know of any of the person or persons who were the employers or partners of Mr. Manarite at the time of the telephone call in question?

9. In connection with this phone call were you a partner in the operation of the dice game at the premises in Ojus, Florida?

10. Mr. Harris, did you at any time in January or February of this year, make an interstate telephone call in connection with the dice game that occurred in Ojus, Florida?

Petitioner was brought before the judge and argument was held concerning the propriety of granting immunity in the circumstances. The judge stated that he was satisfied that petitioner would receive complete immunity and directed him to answer the questions. After petitioner again refused to do so before the grand jury, he was asked the questions by the judge, and on his further refusal was summarily adjudicated in contempt. This procedure was held invalid by this Court in *Harris* v. *United States,* 382 U.S. 162.

In further proceedings on remand it was stipulated that if petitioner were to reappear before a federal grand jury he would again refuse to answer the questions; that petitioner was in Miami, Florida during the period with which the questions dealt and that the 1963 grand jury, before which petitioner had previously appeared, was no longer in session; but that the government was prepared to take petitioner before a new grand jury if he was willing to testify (R. 31–32). Petitioner was again adjudged guilty of contempt (R. 35), and on May 16, 1966, sentenced to imprisonment for one year (R. 98–99). The court of appeals reduced the sentence to six months pursuant to *Cheff* v. *Schnackenberg,* 384 U.S. 373, 380, but in all other respects affirmed the conviction.

ARGUMENT

The issue whether the questions asked of petitioner related to a possible violation of the Communication Act, so that it was proper to accord him immunity under that Act, was determined against petitioner on the prior appeal (334 F. 2d 460), and this Court declined to review that issue when it granted certiorari to review the propriety of the summary procedure. Petitioner now seeks to raise the same issue in another form by arguing that in the Rule 42(b) proceeding the government was required to prove—and he was entitled to production of documents in an attempt to refute—that the questions asked were pertinent to the inquiry. The argument is without merit. The judge's ruling that petitioner would have immunity subsumed a finding of pertinency since for the judge to uphold the immunity he had to find that the questioning related to an inquiry into violations of the Communications Act. And save as pertinency may relate to whether immunity will attach, a witness before a grand jury may not question the pertinency of the questions asked of him. *Blair* v. *United States*, 250 U.S. 273, 282–283.[1] See, also, *United States v.*

[1] The Court said there:

> [The witness] is not entitled to urge objections of incompetency or irrelevancy * * * for this is no concern of his. * * *.
>
> [He] is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization. * * *
>
> [Nor is he] entitled to set limits to the investigation that the grand jury may conduct. * * * It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by

United States District Court, 283 F. 2d 713, 719–720 (C.A. 4), certiorari denied, 352 U.S. 981; *United States* v. *Neff*, 212 F. 2d 297 (C.A. 3); *United States* v. *McGovern*, 60 F. 2d 880, 888–889 (C.A. 2), certiorari denied, 287 U.S. 650; *Application of Radio Corp. of America*, 13 F.R.D. 167 (S.D.N.Y.).

Russell v. *United States*, 369 U.S. 749, and *Gojack* v. *United States*, 384 U.S. 702, relied on by petitioner, are inapposite. They arose under the contempt of Congress statute, 2 U.S.C. 192, under which a person is guilty of contempt only when he "refuses to answer any question *pertinent* to the question under inquiry." (Emphasis added.) No such limitation is imposed by 18 U.S.C. 401(3), under which petitioner was indicted. Also, a committee of Congress operates in aid of legislative power and has no prosecutorial function; greater limitations upon its power to conduct a wide-ranging investigation, compared with that of a grand jury, may therefore be appropriate.

Petitioner's argument that it was error to deny his demand for the production of certain information by

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questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. * * * [T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. * * *

And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate facts in order to determine the question whether the facts show a case within their jurisdiction.

the government (see R. 32–34, 96–97) depends upon his position that he could properly challenge the purpose and scope of the grand jury investigation. The argument falls with its premise. The only issue in the contempt proceeding was whether petitioner had wilfully refused to obey the order of the court to answer. The information sought was thus not relevant to any possible defense to the contempt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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